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File No. (9) Transfer Property 146

I. Tax Department

.H/ BRANCH

Subject:-

Opinion under the

12/10/46 Transfer of Property

HCI 1882

File No. 9 Transfer of Property/46

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C O N T E N T S.

Legal Department File No. O. Transfer of Property/46.

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Clause (e) of section 108 of the Transfer of Property Act provides that in the absence of a contract or local usage to the contrary, if by fire, tempest or flood, or voilence of an army or of a mob or other irresistible force any material part of the property be wholly destroyed or rendered substantially and permanen-ly unfit for the purposes for which it was let, the lease shall at the option of the lessee, be a void. Proviso thereto lays down that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision. It appears from this provision that the leasee would not be liable for damage by fire in the absence of proof that the fire was due to his negligence (see East India Distilleries Ltd. vs. Mathias 51, Mad. 994). It appears that in present case petrol was stored in a barrel in the building which was hired for storing paddy seds and while the petrol from the barrel was being transferred to two drums, fire broke out and gutted the whole building. The Deputy Director of Agriculture in his letter dated 31st August 1944 states that "the outbreak of fire appears to be due either to the presence of a bed lamp or the presence of the huricane lantern in the hands of Fakirappa the driver." It appears from these facts that the fire was due to the negligance of Government servants and consequently Government would be liable to make good the loss to the owner of the building (see Halsbury Vol XX page 233).

The next question for consideration is the quantum of damag Under clause (m) of section 108 of the Transfer of Property Act the lessee is bound to keep, and on the termination of the lease to restore the property in as good condition as it was in at the time when he was in possession subject only to changes caused by reasonable wear and tear etc. This provision requires the tenant to leave the premises in the same state as when he entered. Since the rebuilding will increase the Value, the damages caused by the destruction by fire of demised premises will be assessed "by deduction the amount of this increase from the cost of rebuild ing" (see Halsbury Vol XX page 234). According to Sir E. Coke

burning of the house by negligence or mischance is waste. "In an action x for waste the measure of damage not the sum which it would cost to restore the property to its original state less a discount for immediate payment; this shows the utmost limit of xxxx damages, but the true measure is the injury done to the reversion" (See Halsbury Vol XX page 201). The Executive Engineer in his letter at page 27 ante states:-

> "The cost of reconstructing the burnt building at present day rates works out to Rs.9442. Further life of the building has been assumed as 15 years and considering that it was nearly 100 years old the present value of the building would be $\frac{15}{115}$ x 9442 i.e. Rs. 1232."

Considered in the light of the law stated by Halsbury the injury done to the reversion appears to have been properly assessed by the Executive Engineer. If the ---- is not agreeable to accept this amount in full satisfaction of his claim Government may surrender possession of the vacant site of the burnt building to the owner and await further developments.

Id/- P.N.M.

Remembrancer of Legal Affairs.

U.R. to R.C.D. No. 2215, dated 22nd March 1946.

4-Cs.

N.V.V.
11/7.

Office of the A.G.A.

Clause (g) of section 111 of the Transfer of Property Act provides:

> "A lease of immoveable property determines by forfeiture; that is to say - (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming a title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may reenter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease."

Section 112 provides :

> " A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:
>
> Provided that the lessor is aware that the forfeiture has been incurred :
>
> Provided also that where rent is accepted after the institution of suit to eject the lessee on the ground of forfeiture, such acceptance is not waiver."

It is clear from these provisions that as breach of a condition makes the lease voidable, the forfeiture is not complete unless and until the lessor gives notice that he has exercised his option to determine the lease and the acceptance of rent after the forfeiture has been incurred amounts to waiver of forfeiture. "If the rent is accepted for any period subsequent to the breach, it makes no difference that it is accepted 'under protest' or without prejudice to the forfeiture e.g. as compensation for use and occupation; or that it is credited to a suspense account or that there is a proviso in the lease requiring waiver to be in writing" (see Mulla's T.P.Act, 2nd Edition P.651). Although the Transfer of Property Act does not apply to crown grants, still the aforesaid general principles of law will govern the leases of Government lands. In exercise of powers vested under condition 5 of the lease dated 23-5-1939, Government gave notice to the lessee the Cricket Club of India to remove the unauthorised structure within a month from the date of notice and remedy the breach of lease. This notice does not appear to be quite in order. It should have been clearly stated therein that on the failure of the

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lessee to remedy the breach within the aforesaid period, Government would forthwith exercise their right of re-entry. Further without the consent of the lessee time was given to the tenant of the sub-lessee of the premises up to the end of October 1946 for remedying the breach. In the circumstances it appears necessary that Government should give to the lessee a fresh notice of forfeiture and re-entry on failure to remedy the breach within a specified period.

2. The tenant of the sub-lease was given time to remedy the breach of the condition on or before 31st October 1946. It is not known whether he has compiled with it. If he has not, a fresh notice of forfeiture and re-entry as stated above will have to be given to the lessee, and no rent should be accepted from the lessee; nor should it be accepted under protest, for , such acceptance would amount to a waiver of the breach.

Sd/- P.N.N.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 7393 dated 29th October 1946.

4-Cs.

M.V.V.
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Office of the R.L.A.

It appears that in 1881 a parcel of Government land at Clarke Basin, near Wadi Bunder about 36,309 sq. yds. in area was leased to the Bombay Port Trust subject to the condition among others that it was not to be used for building purposes. The Bombay Port Trust, however, constructed certain buildings on this land. Thereupon a notice to quit and deliver vacant possession of the land to the Collector of Bombay on or before 30th April 1942 was served on the Bombay Port Trust in November 1941. Even after service of the notice the Bombay Port Trust remained in possession of the land and went on paying the rent to the Collector of Bombay. They raised certain contentions and succeeded in getting the decision in the matter postponed from time to time. They continued to pay the rent till 1945-46 and the amount was credited to Government.

The question for the consideration of the R.L.A. is whether it is necessary at this stage to serve a fresh notice to quit on the Bombay Port Trust as suggested by the Solicitor to Government in his opinion No. 6538 dated the 25th September 1946 at page 153 ante.

As rent was accepted by Government after the notice to quit was served on the trustees it amounts to waiver of that notice and also acquienscence in the breach of covenant on the part of the tenant. " Acceptance of rent due on a date after the forfeiture is incurred is a waiver of forfeiture. This because acceptance of rent is an affirmance that the lease was subsisting at the time when the became due." (cf. Mulla's Transfer of p Property Act - pp. 650 - 51). It is true that the Bombay Port Trust kept on postponing consideration of the notice but since Government was aware of the breach of and acquiesced in it for over a period of four years and with full knowledge received the rent a presumption may arise that Government had released

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the covenant or granted a licence for the user. (cf. 20 Halsbury's Laws of England p.231 para. 253; 1900 1 Ch. 112 and 1900, 1 Ch. 108). It will not now be easy for Government to eject the trustees for breach of this condition, (pl.see Advocate General's opinion dated 6.4.1941 at slip 'L'). Whether acquiescence for this period does or does not give rise to the presumption of release, it is undesirable for Government to continue the acquiescence any further and it would be advisable ex majori cautela to serve a fresh notice to quit on the Port Trust as soon as possible and to follow it up by an amicable settlement of the dispute.

Sd/- P.N.M.
20/11/46.

Remembrancer of Legal Affairs.

U.O. to R.D. No. 8301, dated the 21st November 1946.

4-Cs.

M.V.V.
11/7.

Office of the R.L.A.

A sale of immoveable property of the value of one hundred rupees and upwords can be made only by a registered deed (see section 54 of the Transfer of Property Act). Consequently, failure to register sales of lands where consideration is more than Rs.100/- would mean a defect in the title of the vendee even though possession has been delivered to him and the vendor has consented to an entry in the mutation /register; and that defect will continue until the possession of the vendee has ripended into a title by adverse possession for 12 years.

Sd/- D.V.Vyas,

Remembrancer of Legal Affairs.

U.O.R. to R.D.No. 9030, dated the 13th December 1946.

4-Cs.

D.V.V.
11/7.

Office of the R.L.A.

It is true that under section 107 of the Transfer of Property Act, where a lease of immoveable property is made by a registered instrument or where there are more instruments than one, each such instrument shall be executed by ~~him~~ both the lessor or lessee; but that provision does not apply to leases for agricultural purposes (see section 117 of the Transfer of Property Act) A rent note signed only by the intending lessee is not a lease under the Transfer of Property Act, but would be a lease under the Registration Act and question of its registration would be decided under that Act(see Mulla's Transfer of Property Act). It follows, therefore that leases for agricultural purposes executed by the intending lessors or lessees can be registered on their admitting the execution thereof under section ~~x~~ 58(1) of the Indian Registration Act. The view taken by Deputy Secretary, Revenue Department, at page 32 ante on this point does not appear to be correct.

2. The view taken by Deputy Secretary, Revenue Department on the second point is correct.

Sd/- D.V.Vyas,
18/12.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 9302, dated the 20th December 1946.

4-Ca.

M.V.V.
11/7.